But on appeal of that district court opinion, the Second Circuit accepted the Government's argument that it has standing to appeal this case because (1) "the district court's decision interferes with its obligation to ensure that the United States complies with the Vienna Convention on Diplomatic Relations," and (2) "the district court's decision upholding service of process on Mugabe and Mudenge as agents for ZANU-PF usurped the executive branch's constitutional authority to conduct foreign affairs and to send and receive ambassadors." Pet. App. 7a–8a.[9]

It is respectfully submitted that the appeals court wrongly accepted the implications of the Government's arguments, namely, that the Constitution exclusively vests foreign affairs powers in the Executive Branch, and that the power to receive ambassadors is substantive. That is, the Constitution does not clearly support the existence of the expansive powers that the Executive claims. Absent the constitutional harms that it alleges, the Government has no standing in this case.

A. Courts, Not The Executive, Have The Final Say Under The Constitution In Interpreting Treaties.

Regarding the first ground for Government standing, the Second Circuit held that "[a] corollary to the executive's power to enter into treaties is its obligation to ensure that the United States complies with them." Pet. App. 7a. The court thus determined that the Government's mere *allegations* that "the district court's interpretation * * * plac[es] the United States in breach of its international obligations * * *" was a sufficient claim of injury to support standing. *Ibid.* Put another way, the lower court held that the Executive Branch

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[9] Mugabe is defendant Robert Gabriel Mugabe; Mudenge is defendant Stan Mudenge; and the ZANU-PF is defendant Zimbabwe African National Union-Patriotic Front. As petitioner explains in greater detail (at Pet. 4–5), Mugabe and Mudenge were both served on behalf of the ZANU-PF, in which they are officers.

can assert a sufficient injury to gain standing to intervene and appeal merely by *asserting* that the district court's interpretation of a treaty is incorrect.

This reasoning is circular: it allows the Executive Branch to assume the answer to the very question at issue—whether a treaty has been violated—in order to secure standing. By this logic, unless this Court acts, the Government will have free reign to intervene—and even appeal against the wishes of the parties—in *each and every case* that the Government asserts in any way involves an international treaty.

Even worse, this reasoning would deprive the Judiciary of its core constitutional authority. As Chief Justice Marshall wrote in the foundational opinion establishing judicial independence in the American constitutional system, "[i]t is emphatically the province and duty of the *judicial department* to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177 (emphasis added). To eliminate any doubt that this judicial responsibility "to say what the law is" extends to the realm of agreements between nations, this Court has repeatedly held, in opinions dating back to the first days of the nation, that *courts* have the responsibility to interpret treaties. See, *e.g.*, *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 239 (1796) ("the courts, in which the cases arose, were the only proper authority to decide, whether the case was within this article of the treaty, and the operation and effect of it"); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature * * *."); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961) ("courts interpret treaties for themselves"); *Japan Whaling Ass'n* v. *Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treaties"). See also Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 946–947 & nn.325–332 (2004).

The Second Circuit did not give sufficient deference to this unbending line of cases. In the part of its opinion interpreting the relevant treaties on the merits, the Second Circuit correctly acknowledged that the Executive Branch's view of a treaty is "not conclusive." Pet. App. 15a (citation omitted). However, the court of appeals did not apply that same appropriate standard to the question of standing. Rather, it accepted as correct, for purposes of standing, the Executive Branch's assertion that the district court placed the nation in violation of a treaty.

In doing so, the Second Circuit wrongly assumed that what is in fact a judicial function—interpreting treaties—was an executive function. And without the constitutional power, the Executive Branch has no constitutional injury—and so no standing—on this ground.

B. Authority Over Foreign Affairs Is Not Solely The Executive's, But Is Split Under The Constitution Among The Three Branches Of Government.

The Second Circuit's second ground for granting standing to the Government rests on the claim that the district court had usurped the Executive's foreign affairs powers, and specifically its power to receive ambassadors.

To be sure, the Executive Branch has broad responsibilities in the realm of foreign affairs, especially in its ability to *conduct* foreign affairs. But foreign affairs involves more than conduct; accordingly, the Executive's overall foreign affairs powers are neither absolute nor exclusive. Rather, the Constitution parcels out various responsibilities relating to foreign relations between the three branches of government. Therefore, there is no basis for the Government to claim that the Executive's powers have been "usurped." While the Judiciary's and Congress's role in foreign affairs may be more limited than the Executive's, they are nonetheless vitally important to the constitutional scheme and must be protected.

The discussion above demonstrates that the Judiciary has the constitutional responsibility to interpret treaties. Even in the wider realm of foreign affairs, the Judiciary still retains authority. As this Court held in *Baker* v. *Carr*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. 186, 211 (1962). See also *Banco Nacional De Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1963) ("[i]t should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it").

Congress also has substantial foreign relations powers, both explicit and inherent. Most obviously, the Constitution provides that the Senate must ratify all treaties by a two-thirds vote for them to become law. U.S. CONST. art. II, § 2. But its authority is far broader than that. As Professor Tribe has written:

> Beyond the appropriations power, Article I, § 8 confers upon Congress a variety of ways in which it may control the structure of the devices and institutions available to the President in the conduct of foreign policy. Congress is empowered in Article I, § 8, to "lay and collect . . . Duties, Imposts and Excises"; to "regulate Commerce with Foreign Nations"; to "establish an uniform Rule of Naturalization"; to "define and punish . . . Felonies committed on the high seas, and Offences against the Law of Nations"; to "declare War"; to "raise and support Armies"; to "provide and maintain a Navy"; to "make Rules for the Government and Regulation of the land and naval Forces"; to "provide for calling forth the Militia to . . . repel Invasions"; and to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 642 (3d ed. 2000).

Congress' power goes further still. It has legislated on the sensitive area of immunity of foreign nations in United States courts, by passing the Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. §§ 1330 *et seq.*[10] Congress also has power in the specific area of the admission of foreigners to the United States. Far from being an executive power, this Court has repeatedly held that the national legislature has "*plenary* power" on this topic. See, *e.g.*, *Kleindienst*, 408 U.S. at 766 (citing *Boutilier* v. *INS*, 387 U.S. 118, 123 (1967) (Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens); *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547 (1895); *Galvan* v. *Press*, 347 U.S. 522 (1954)).

Critically, Congress' power over the admission of foreigners extends specifically to the admission of diplomats and ambassadors, such as the individual defendants in this case. Under the Immigration and Naturalization Act, Congress has expressly regulated the issuance of diplomatic visas. See 8 U.S.C. §§ 1101(a)(11), 1201(b).

Therefore, it should be clear that the Executive does not have exclusive control over foreign affairs, and that neither

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[10] Significantly, the FSIA also reaffirms the role of the Judiciary in foreign affairs, specifying that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States." 28 U.S.C. § 1602. See also *Republic of Austria* v. *Altman*, 541 U.S. 677, 691 (2004) (the FSIA codifies a theory that "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch").

Congress nor the courts can be said to "usurp[]," Pet. App. 7a, the Executive's power to conduct foreign affairs by exercising their own foreign affairs powers.

The Second Circuit also invoked Article II, section 3 of the Constitution. That provision states in part that the president "shall receive Ambassadors and other public Ministers." From those words, the appeals court concluded that the Executive Branch has "authority to set the terms upon which foreign ambassadors are received," Pet. App. 11a, and that the district court's decision "asserted adverse effects" on it, *ibid.*—an injury that justifies the Government's standing.

But the Constitution's Framers intended the power to receive ambassadors to be purely ceremonial, and *not* the basis for any substantive power. Alexander Hamilton states the point plainly in the *Federalist Papers*. As he explains,

> The President is also to be authorised to receive Ambassadors and other public Ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance, *which will be without consequence in the administration of government.*

FEDERALIST NO. 69, *supra*, at 352 (emphasis added).[11]

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[11] See also Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism And Foreign Affairs*, 102 MICH. L. REV. 545, 677 n.646 (2004) ("Hamilton suggested a narrow reading of the Ambassador Receipt Clause"). James Madison expressed similar sentiments on the minimal importance of this provision, referring explicitly to FEDERALIST NO. 69, and stating that "it would be highly improper to magnify the function into an important prerogative." VI THE WRITINGS OF JAMES MADISON 162 (G. Hunt ed. 1906). But see XV THE PAPERS OF ALEXANDER HAMILTON 41 (H. Syrett ed. 1969). To the extent that the clause functions as a basis for the president's power to recognize foreign nations, that aspect of the provision is not implicated by this case.

Given the intended limited nature of this power, the Second Circuit erred by relying on this authority as grounds for the government's standing to appeal. This is especially so in a case, such as this one, in which the Government was never even called upon to recognize any diplomat (as Mugabe and Mudenge traveled to the United States at the behest of the United Nations, not of the Government).

C. The Government Has Argued In This Case For An Overly Expansive Executive Power.

The Second Circuit's opinion was undoubtedly influenced by the Government's sweeping interpretation of Executive power. For example, one of the Government's briefs to the Second Circuit states that "courts have long recognized that they are *bound* by Executive Branch suggestions concerning head-of-state immunity. The district court's failure to *defer completely* to the Executive Branch[] * * * impermissibly interfered with and may well undermine the Executive's conduct of foreign relations." U.S. 2d Cir. Br. 14 (emphasis added). The Government's brief makes references elsewhere to the "complete" and "full" deference that the Executive claims it is due. Despite this absolutist language, the Government cites no legal authority that specifically states federal courts are "bound" by and must "fully" defer to the Executive in the realm of foreign affairs or treaty interpretation.

The district court, appropriately, did not agree with the Government's claims of executive authority. In his Decision and Order of Feb. 14, 2002, Judge Marrero called the Government's position "troubling." Pet. App. 113a. As he explained, "[i]mplicit in the Government's posture is * * * that upon being handed the Government's proffered reading of an international agreement, the Court is obliged, at the risk of

otherwise causing indignity and affront, to give binding effect to what the Government says the treaty means." *Ibid.*

The Second Circuit, however, accepted the Government's mere *assertion* that a treaty was being violated as proof of an actual treaty violation, and further accepted the Government's claim that this violation somehow was an injury sufficient to justify non-party standing. But this reasoning rests on the Government's false premise that the Executive Branch can bind the courts on matters of treaty interpretation, and force them to defer. The Second Circuit did not object to the Government's claims of such unreviewable power, but this Court should. For, as is next discussed, this case has even broader implications than may be apparent at first.

II. The Same Expansive View Of Executive Power That The Government Claims Here Has Been Used To Justify Other Troubling Actions.

It is not merely the case that the Government's expansive view of Executive power in the realm of foreign affairs is unsupported by the Constitution. Rather, the Government has developed its position over the last several years, as an intentional effort to strengthen the Executive Branch. This asserted amplification of executive powers should receive this Court's attention, because it comes at the expense of the other branches of government. Further, the very same legal arguments used as the basis for expanded Executive power in the case at hand have also been relied upon in several other troubling areas. Therefore, if this Court lets stand the Executive's arguments in the context of this case, it is tacitly permitting their use in these other contexts as well.

A. The "Torture Memo"

There is perhaps no better example of the consequences of the Government's arguments in the case at hand than the infamous "Torture Memo" that became public in 2004. In it,

the Government made a number of the same arguments that it makes here.

The Torture Memo concerned the interpretation of the Geneva Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, as well as the United States statutes that implement it (18 U.S.C. §§ 2340–2340A). The memo was written by the Department of Justice's Office of Legal Counsel for the White House. The memo takes an exceedingly narrow view of what counts as torture. Specifically, the Justice Department counseled:

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. * * * We conclude that the treaty's text prohibits only the most extreme acts by reserving criminal penalties solely for torture * * *.

Torture Memo at 1–2. The memo also addresses the power of the Executive Branch to interpret treaties. It uses language strikingly similar to the arguments made to the Second Circuit, and which the Second Circuit accepted, on the question of the Government's standing. Just as the Government argued before the Second Circuit that courts are bound by the Executive's interpretation, the Torture Memo states that "The Executive's interpretation is to be accorded *the greatest weight* in ascertaining a treaty's intent and meaning." *Id.* at 16 (emphasis added). If the Executive's interpretation has the "greatest weight," then the Judiciary's independent interpretation would by definition have less, if any, weight. This directly parallels the Government's claim here that the courts are "bound" by the Executive's treaty interpretation.

Similarly, the Government in the case at hand argued before the Second Circuit that it must "[f]ully" defer to the Executive (U.S. 2d Cir. Br. 16). The Torture Memo contains parallel advice. It advises the White House that "[i]n the area

of foreign affairs * * * the avoidance canon has special force." Torture Memo at 34. The "avoidance canon" it refers to is a rule of statutory construction the memo defines as: "statutes are to be construed in a manner that avoids constitutional difficulties." *Ibid.* But by giving "special force" to this canon in the realm of foreign affairs, the Torture Memo is essentially counseling that courts should go out of their way to avoid reading constitutional difficulties into Executive decisions. That is, the memo instructs that, in the area of foreign affairs, courts must go out of their way to let Executive decisions stand unperturbed. This is, in essence, the same argument that the Government made in this case, when it claimed that courts should "fully" defer to the Executive.

Finally, the Torture Memo relies on Section 1 of Article II of the Constitution, which states that "[t]he executive Power shall be vested in a President of the United States of America." According to the memo, "[t]hat sweeping grant vests in the President an unenumerated 'executive power' and contrasts with the specific enumeration of the powers * * * granted to Congress in Article I." *Id.* at 37. Similarly, in the case at hand, the Government wrote that the "provision[] vesting the 'executive Power' in the President * * * confer[s] on the President the authority to conduct foreign affairs." U.S. 2d Cir. Br. 17. The arguments are at core the same.[12]

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[12] For criticism of the sort of broad interpretation of the "Vesting Clause" that the Government asserts here, see, *e.g.*, Bradley & Flaherty, *supra*, 102 MICH. L. REV. at 551 (noting "the textual case for the Vesting Clause Thesis is at best uncertain" and "historical sources that are most relevant * * * contain almost nothing that supports the Vesting Clause Thesis, and much that contradicts it").

Although the Department of Justice in 2004 issued a new memorandum that supercedes the Torture Memo, see Memorandum from Daniel Levin, Acting Assistant Attorney General, to the Deputy Attorney General, on "Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A" (Dec. 30, 2004), *available at*

B. *Hamdi* v. *Rumsfeld*

The arguments that the Government made in the Second Circuit in this case also parallel those that this Court rejected in *Hamdi* v. *Rumsfeld*. Justice O'Connor, in her already much-cited opinion in *Hamdi*, noted that "we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. * * * [T]his approach serves only to *condense* power into a single branch of government." 542 U.S. at 535–536 (Opinion of O'Connor, J.). Justice Thomas, in his dissent, also recognized that the Constitution does not vest control over foreign affairs exclusively in the Executive Branch. As he wrote, "Congress, to be sure, has a substantial and essential role in both foreign affairs and national security." 542 U.S. at 582 (Thomas, J., dissenting).

Yet just as in *Hamdi* the Government claimed that the separation of powers doctrine insulated its decisions from judicial review, it claimed in this case that its powers are so expansive that the Judiciary must fully defer to them, and that any judicial treaty interpretation the Executive disagrees with causes a constitutional injury justifying standing. These parallel the arguments that this Court has already rejected.

C. Domestic Surveillance

Recently, the media revealed that the Government has been engaging in surveillance of "Americans and others inside the United States * * * without the court-approved warrants ordinarily required for domestic spying." James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. The Department

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http://tinyurl.com/djxr4, that second memo does not disavow the Executive's assertions of power; rather, it merely states that the assertions "have been eliminated from the analysis." The Government's arguments in the case at hand show that the Government has not yet abandoned them.

of Justice, in response, issued a public defense of its programs. The arguments that the Justice Department offers in its Surveillance Memo in support of the Government's eavesdropping programs are, again, in many respects, similar to the ones that it offered to the Second Circuit in this case: the President has "Inherent Constitutional Authority" to order surveillance without warrants. Surveillance Memo at 6, 7, 8. The "Canon of Constitutional Avoidance" means that the courts should not review the contested presidential decisions. *Id.* at 28, 31. The "Vesting Clause" grants the President "[t]he executive Power" to act unilaterally. *Id.* at 30. And the memo claims that the Executive's unilateral decision about constitutional limits ends the debate about whether the Executive has unilateral power. *Id.* at 34. The Government's arguments there and here are parallel.

D. The Arguments' Pedigree.

It is not a coincidence that the Government relied on the same legal arguments in these situations that it relied on in this case. Rather, the arguments appear to reflect a deliberate effort by the Justice Department to expand Executive powers.

A 2002 memorandum opinion from the Justice Department Office of Legal Counsel sets forth the arguments that the Government has deployed not only in the case at hand, but also in the other situations discussed above.[13] That opinion, like all such Office of Legal Counsel memorandum opinions, establishes official government policy. It states:

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[13] Memorandum from Sheldon Bradshaw, Deputy Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel to the Senior Associate Counsel to the President and National Security Council Legal Advisor, on "Constitutionality of the Rohrabacher Amendment" (July 25, 2001), *available at* www.tinyurl.com/rg9ae.

- "Despite the fact that Article II does not enumerate a Presidential power to interpret treaties, this function has been recognized";
- "[T]he President's foreign relations power includes a broad range of authority with respect to treaties. These include, *inter alia*, responsibility for treaty interpretation";
- "[T]he courts would be deciding a question of the utmost importance to the relations between [nations] * * *. To invite the courts to play such a role * * * is to disrupt the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs."

Id. at 6, 8 & nn.7, 8. Significantly, the memorandum opinion states that a specific law review article, John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851 (2001), provides the "basic premise of the analysis that follows." That article's arguments, not surprisingly, also parallel those in the case at hand:

- "[T]he treaty power is fundamentally executive in nature";
- "[T]he framing generation likely understood the treaty power as an exclusively executive power";
- "Presidents have broader powers of treaty interpretation than has been commonly understood";
- "Article II's Vesting Clause must refer to inherent executive . . . powers unenumerated elsewhere";
- "Senate's participation in treaty making and appointments merely indicates the dilution of the unitary nature of the executive branch, rather than the transformation of these functions into legislative powers."

Id. at 853, 854, 869.[14]

Clearly, the Government did not formulate its arguments to the Second Circuit merely for the present case. Rather, they are one facet of a larger Justice Department effort to expand Executive Branch power. The significance of the present case reverberates far beyond the immediate question of Government standing.

* * * *

The United States and England have together experienced the abuses of unbridled executive power. As Justice Jackson observed (see page 2, *supra*), King George went too far. The first grievance listed in the American Declaration of Independence criticizes sweeping Executive power, lamenting that the king "has refused his Assent to Laws, the most wholesome and necessary for the public good." This criticism rings too familiar today.

As a check on such overreaching, the Anglo-American legal tradition has always relied on judicial independence. Mr. Jefferson's epochal bill of complaints recognized this, criticizing that the king "has made Judges dependent on his Will alone" and has engaged in "abolishing the free System of English laws." This Court, like the Framers before it, should reaffirm the Judiciary's role.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14] See also John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1309–1310 (2002) (stating, *e.g.*, "[T]he treaty power * * * ought to be regarded as an exclusively executive power"; "Article II's Vesting Clause establishes a rule of construction that any unenumerated executive power, such as that over treaty interpretation, must be given to the President"; and that the President has a "monopoly over foreign affairs").

Respectfully submitted.

MICHAEL BIRNBAUM, QC
Bar Human Rights Committee of England and Wales
Garden Court Chambers
57-60 Lincoln's Inn Fields
London WC2A 3LS
44 (0) 20 7993 7755

DAVID M. GOSSETT
Counsel of Record
EVAN P. SCHULTZ
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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